IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1088

LIFE OF THE LAND, *et al.*,

Petitioners,

—v.—

CLAUDE S. BRINEGAR,
SECRETARY OF TRANSPORTATION, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT E. ALVEY WRIGHT, DIRECTOR, HAWAII DEPARTMENT OF TRANSPORTATION, IN OPPOSITION

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February, 1974

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In the

Supreme Court of the United States

October Term, 1973

No. 73-1088

Life of the Land, *et al.*,

Petitioners,

—v.—

Claude S. Brinegar,
Secretary of Transportation, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
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BRIEF FOR RESPONDENT E. ALVEY WRIGHT, DIRECTOR, HAWAII DEPARTMENT OF TRANSPORTATION, IN OPPOSITION

OPINIONS BELOW

The unanimous opinion of the Court of Appeals for the Ninth Circuit affirming the District Court's judgment is now reported at 485 F.2d 460; it appears as Appendix A to the Petition.

QUESTIONS PRESENTED

1. Whether the courts below applied the proper standard of review when they found on the evidence of record that it was reasonable for the Federal Aviation Administration to have omitted from the Environmental Impact State-

ment ("EIS") prepared for use under the National Environmental Policy Act ("NEPA") and the Airport and Airways Development Act ("AADA") for the airport expansion involved here, a discussion of certain alleged "alternatives" to the proposed expansion, claimed for the first time in the courts by Petitioners (who participated in the administrative process) as being alternatives worthy of consideration.

2. Whether the findings made by the Department of Transportation as to the expansion project satisfied § 16 (c) (4) of the AADA.

3. Whether it was permissible under the NEPA for the Federal agency to have permitted a private contractor to participate in the drafting of the EIS for the project where the agency itself participated substantially in all stages of the drafting and exercised control over the content of the EIS.

STATEMENT

The Reef Runway project at Honolulu International Airport ("HIA") will add a new principal runway 6,700 feet south of the existing HIA runway system on the fringing coral reef seaward of Keehi Lagoon in Mamala Bay. As indicated in the map appearing at p. 5, this new Reef Runway will move the flight patterns for much, although not all, of the HIA air traffic out over Mamala Bay and away from the densely populated areas of Honolulu currently subject to overflights.[1] As a result, the Reef Runway

[1] The map shows the pattern of takeoffs and landings during so-called "Kona wind" conditions. During "trade wind" conditions, the areas of flight are substantially the same, except that takeoffs and landings are from west to east, rather than from east to west.

will reduce the level of aircraft noise over metropolitan Honolulu; improve safety and reduce the possibility of loss of life by decreasing the number of takeoffs and landings over highly populated areas; increase the capacity of HIA to the level necessary by 1975; and provide an alternative runway during periods when the existing principal runway is under repair. (EIS 5)[2]

A. Factual Background

1. *The Need for the Reef Runway*

The State of Hawaii is approximately 2,400 miles from the continental United States. Over 99% of all passengers, and a significant amount of goods, travel to and from Hawaii by aircraft. During periods of ship or dock stoppages, the airplane is the only means of transportation to or from Hawaii. Honolulu, on the island of Oahu, is Hawaii's largest population center and HIA is Hawaii's major airport. As such, it not only handles a large and growing volume of traffic to and from the mainland and among the Hawaiian Islands, but is now the third largest point for international arrivals in the United States. In addition, since the closing of the runway at the adjacent Hickam Air Force Base, HIA is also a substantial center for military aircraft operations.

The number of aircraft operations (arrivals and departures) at HIA has been steadily increasing, from 257,000 per year in 1961 to 325,000 in 1970. (EIS 1) Present fore-

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In either case, takeoffs or landings are over the densely-populated Kalihi-Palama area and this would be avoided by the pattern indicated for the Reef Runway takeoffs and landings.

[2] We so refer to the final Environmental Impact Statement prepared in connection with the Reef Runway project.

casts indicate that the number of aircraft operations will increase to 382,000 by 1975 and 493,000 by 1985. (EIS 5) Despite this heavy usage of HIA, the airport has at present a single principal runway, known as 8L-26R, used during prevailing wind conditions. At present, the 8L-26R runway is operating at capacity several hours daily, and by 1975, if no additional facilities are provided, will be operating at daily and annual capacity. (EIS 5)

Runway 8L-26R extends from west to east and is so located that arriving and departing aircraft must fly over densely populated portions of the Honolulu metropolitan area. These overflights by heavy jet aircraft result in excessive noise pollution in a number of areas of metropolitan Honolulu. Studies of jet noise in the area of HIA have shown that over 130,000 residents are subject to a noise level of 85 decibels or more. Furthermore, the areas of metropolitan Honolulu currently subject to overflight have a heavy concentration of schools, as shown in the map on p. 5, and as a result some 13,000 school children in the Kalihi-Palama area (east of HIA) are subject to noise levels of up to 105 decibels for as much as one hour each school day. (EIS 12-14) The Council on Environmental Quality indicates that an 85-decibel noise level is equivalent to that of a pneumatic drill at 50 feet and ranks the discomfort resulting from such a noise level as midway between "annoying" and "hearing damage (8 hours)."[3] Residents west of the airport are subject to lower, but still significant, noise levels. (EIS 13)

In addition, the location of the present runway 8L-26R creates a significant safety hazard by reason of the overflights of densely populated areas. (EIS 5) Thus, in the

[3] *Environmental Quality*, The First Annual Report of the Council on Environmental Quality (1970), p. 125, cited at EIS 14.

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FORT KAM ARMY HOUSING
PEARL HARBOR CHANNEL
HICKAM HARBOR
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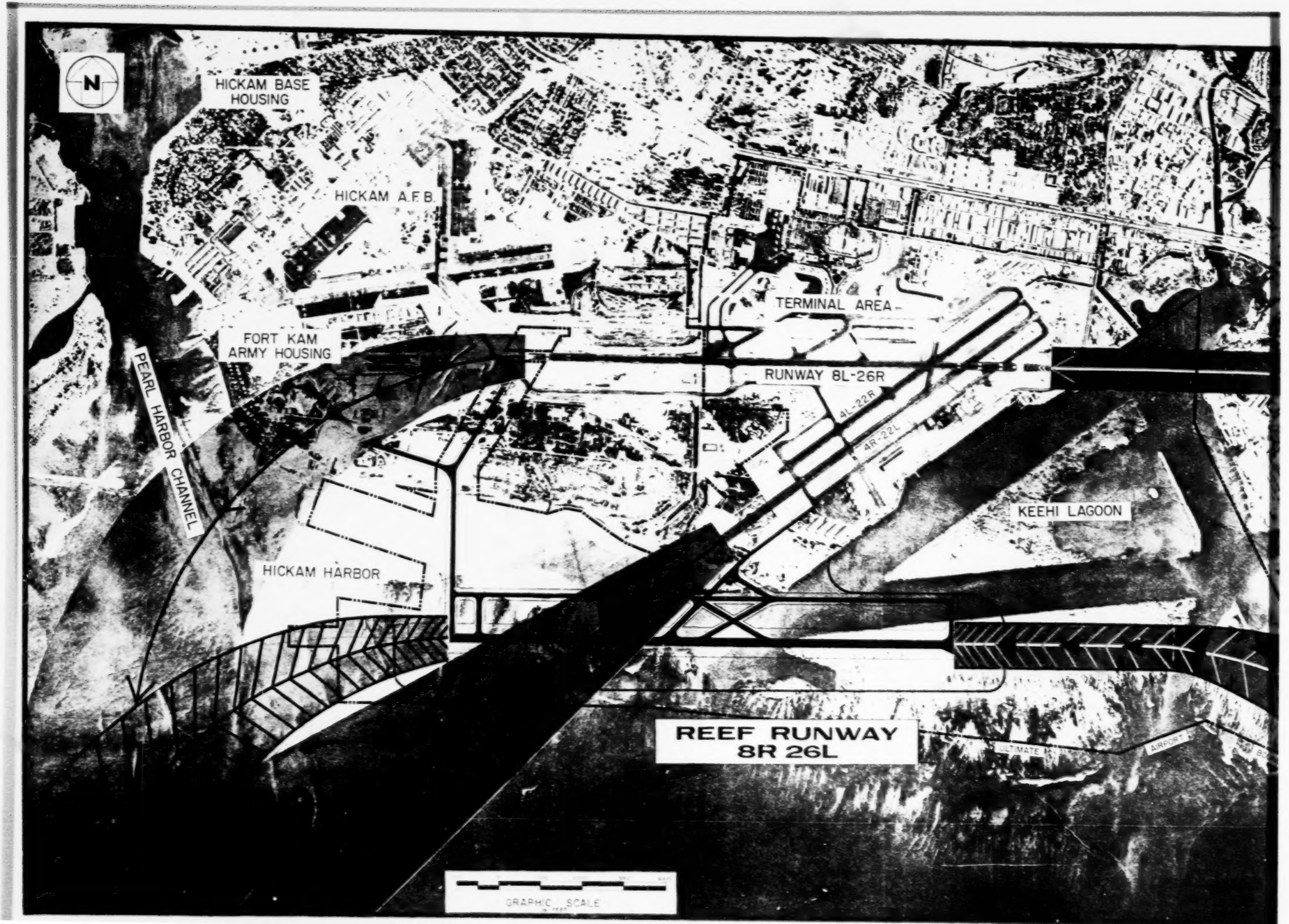
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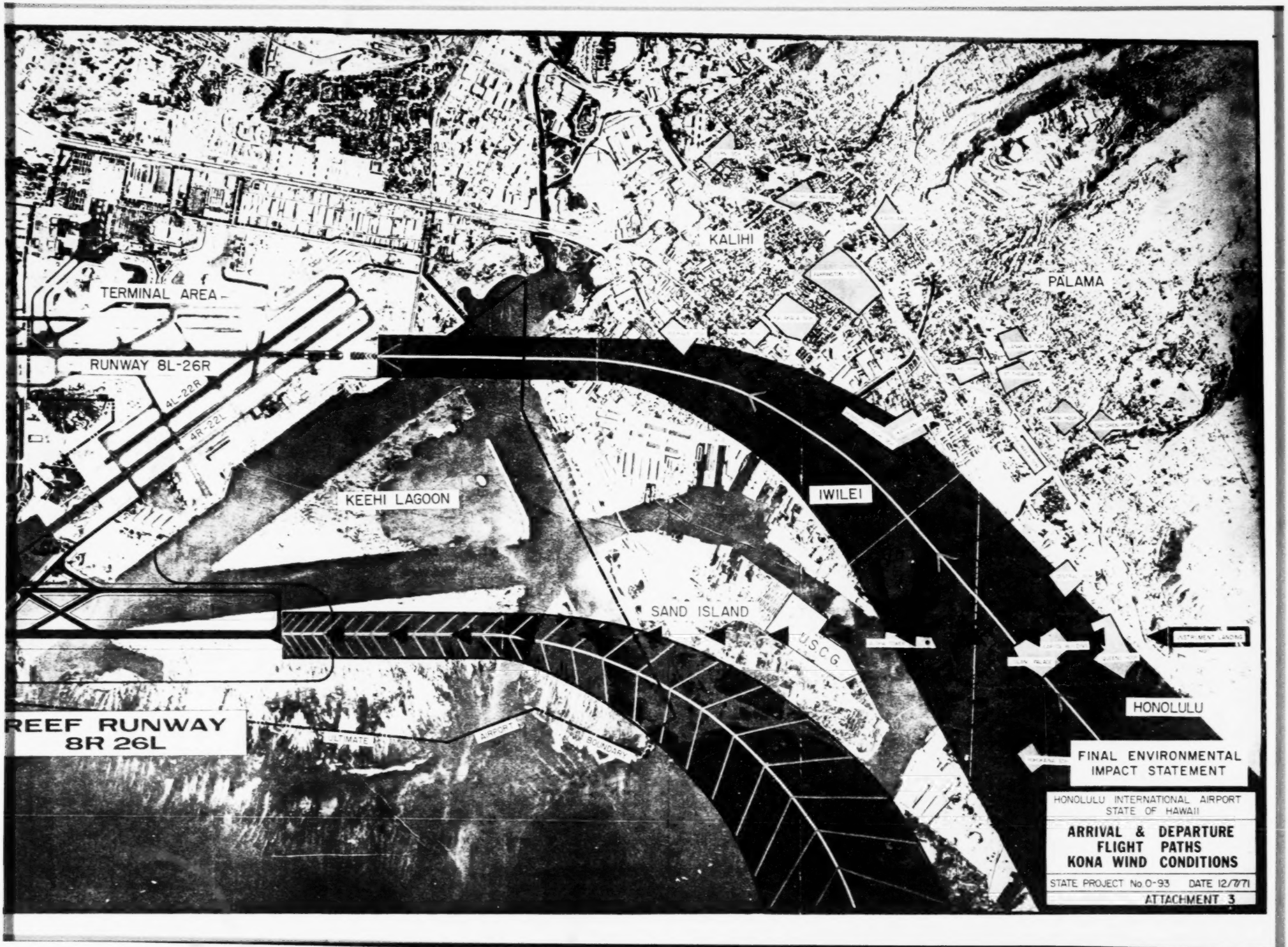
GRAPHIC SCALE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USCG
HONOLULU
REEF RUNWAY
8R 26L
FINAL ENVIRONMENTAL
IMPACT STATEMENT
HONOLULU INTERNATIONAL AIRPORT
STATE OF HAWAII
ARRIVAL & DEPARTURE
FLIGHT PATHS
KONA WIND CONDITIONS
STATE PROJECT No 0-93 DATE 12/1/71
ATTACHMENT 3

event of an air crash just after takeoff or prior to landing, the potential for loss of life on the ground is high. (Tr. 700-04; 708-11) These considerations of safety are of more than usual importance at HIA because large numbers of takeoffs and landings are by Air Force KC-135 tanker aircraft carrying up to 160,000 gallons of highly flammable jet aviation fuel. (Tr. 709-10)

2. *Preliminary Studies and the Adoption of the Reef Runway Project*

The severe problem with aircraft noise first appeared with the introduction of jet aircraft in approximately 1960. In February, 1961, the Senate and House of Representatives of the first legislature of the State of Hawaii resolved to seek a solution to the noise problem, and the following year the Hawaii House of Representatives reaffirmed that intention. As a result, the State initiated a study on the means of eliminating the excessive aircraft noise at HIA. (Tr. 492-94) This early study, which was utilized in the consideration of the Reef Runway project here at issue, called for the construction of a new "seaward jet runway" to be aligned so as to minimize noise-pollution problems. However, this particular proposal was never acted upon because the prevailing crosswinds would have made the proposed runway unsafe. (Tr. 698-700)

In 1966, the State of Hawaii retained consultants to prepare a Honolulu International Airport Development Plan which, *inter alia*, examined various alternative runway possibilities. (Tr. 496-97) The HIA Development Plan recommended that a new 12,000-foot runway be constructed 1,300 feet south of and parallel to the existing 8L-26R runway. (Tr. 497) In 1967, the Governor of Hawaii appointed a special Task Force to review the proposed master plan. The Task Force came into existence in February, 1967, and

continued its operations until April, 1970. Among the members of the Task Force were the Regional Director of the Federal Aviation Administration, other State and Federal officials, representatives from the airlines and the military and personnel from newspapers and other interested organizations. Virtually all of the 46 Task Force meetings were open to the public. (Tr. 500-05)

The Task Force reviewed the 1967 Development Plan in light of its objectives of (1) reducing noise pollution in affected portions of the Honolulu metropolitan area; (2) increasing the margin of safety in case of aircraft crashes by moving the flight patterns away from populated areas; (3) providing an alternative principal runway during maintenance of the existing runway; and (4) providing sufficient runway capacity to accommodate predicted increases in operations. The Task Force found that the runway proposed by the 1967 HIA Development Plan did not promise to reduce substantially the level of aircraft noise because it was located only 1,300 feet seaward of the present runway. Furthermore, the close-in parallel runway would not have substantially improved the safety conditions since use of it would still have involved overflights of relatively heavily populated areas. Thus, the Task Force recommended to the Governor that the new runway be constructed 6,700 feet south of and parallel to the existing 8L-26R principal runway in order to move the aircraft flight pattern out over the ocean and away from populated areas. (Tr. 501) On August 20, 1968, the Governor approved this proposal for what has come to be known as the "Reef Runway" project.

A number of air carriers which used HIA were unsatisfied with the recommendation of the Task Force as adopted by the Governor. Because construction of the Reef Runway

would necessitate an increase in the landing fees charged to the airlines, they commissioned an alternative study by the Stanford Research Institute. This SRI report was presented to the Task Force on September 30, 1969. (Tr. 520-24) The report recommended that, in place of constructing the Reef Runway, the existing runway be extended and that a new, shorter runway be constructed to handle local inter-island traffic. The Task Force examined the airlines' study but rejected its conclusion on January 29, 1970, on the ground that it would not provide a satisfactory alternative to the Reef Runway. In particular, the Task Force objected that the SRI proposal would only move the noise problem to affect a slightly different portion of the densely-populated Honolulu metropolitan area. (Tr. 523, 536) Furthermore, the proposed alternative would not have solved the safety problem and would merely have postponed for a few years the saturation of HIA's facilities caused by increasing air traffic. (Tr. 524) The final recommendation of the Task Force, therefore, reconfirmed the Reef Runway project and was approved by the Hawaii Director of Transportation and the Governor of Hawaii on February 24, 1970. (Tr. 544)

3. *Keehi Lagoon and the Reef Runway Project*

Keehi Lagoon is a tidal lagoon located south and east of HIA. Separating the Lagoon from Mamala Bay is a fringing coral reef upon which the proposed runway is being built.

Prior to World War II, Keehi Lagoon was a tidal mudflat with sections ranging in depth from a few inches to several feet. One channel provided the only navigable ingress and the Lagoon was little used. During World War II, however, the U. S. Navy began dredging operations which created three seaplane runways. These runways are

1,000 feet wide and between 10,000 and 16,000 feet long. They are situated at the three outer edges of the Lagoon, leaving the mudflats in the center of the Lagoon unchanged. (EIS 5-6)

When the dredging was commenced, the exigencies of World War II were such that scant attention was given to the circulation pattern of water in the Lagoon. (EIS 6) As a result, the dredging created water circulation patterns which trap pollutants in the Lagoon. This, combined with the discharge of some 55,000,000 gallons of raw sewage into Mamala Bay by the city and county of Honolulu (EIS 18), has resulted in the Lagoon's present polluted condition. Thus, while the Lagoon is now somewhat used as a recreational area, recreational uses are primarily limited to uses such as fishing and boating which do not require significant personal contact with the water. (EIS 16) The Lagoon is also the habitat for a small number—between 20 and 100—of the Hawaiian Stilt, a rare bird which uses the mudflats of the Lagoon in the area between the seaplane runways as a seasonal feeding and roosting ground from June to January.[4] (Tr. 674; Ds. Ex. 44)

The proposed Reef Runway will divide Keehi Lagoon and utilize about 765 acres of offshore land for the runway itself and the runway's protective structure. (EIS 11-12) In addition to the runway and appurtenances, the project will involve the creation of the two new deepwater channels. These channels will allow small boats access to both sides of the Lagoon and will enhance the Lagoon's water

[4] There are estimated to be approximately 1,000 Hawaiian Stilts in the State of Hawaii. It is believed that these birds are about evenly divided between the islands of Oahu and Maui, with small numbers on other islands. As indicated in the text, only a portion of the Stilts on the island of Oahu use the Lagoon as a feeding ground and roosting place. (EIS 8, 26)

quality by aiding the ocean to flush out the current pollution in the Lagoon. (EIS 16-18) Furthermore, the project will involve the creation of a 240-acre marine pond which will be maintained by the University of Hawaii as an aquaculture research station. (EIS 38) The project also involves the creation of replacement habitats, both in the Lagoon and in nearby Pearl Harbor, for the Hawaiian Stilt. (EIS 26)

B. The Environmental Impact Statement

1. *Preliminary Steps*

In order to construct the Reef Runway, which is to cost between $60,000,000 and $70,000,000, the state made application to the Federal Aviation Administration ("FAA") for a 50% matching grant under the Airport and Airways Development Act of 1970, 84 Stat. 219, 49 U.S.C. § 1701 *et seq.* ("AADA").

Pursuant to the requirements of AADA, a public hearing was held at the Puuhale School in Honolulu on March 22, 1971, to consider the economic, social and environmental effects of the Reef Runway. Oral testimony was given by a number of public organizations (including Petitioners Life of the Land and the Hawaii Audubon Society), the Kalihi-Palama Community Council, school officials, local residents and others. Conservation groups at the hearing indicated a concern for replacement of the wildlife habitat of the Hawaiian Stilt. As a result of these concerns, and as discussed above, funds have been included in the Reef Runway project for the relocation of the Hawaiian Stilt habitat. None of the participants, including those Petitioners attending, objected to the Reef Runway project. (EIS 8-10)

2. *Preparation of the EIS*

The EIS for the Reef Runway project was prepared jointly by the Pacific region of the FAA and the State of Hawaii, with the Ralph M. Parsons Company, the design consultant on the Reef Runway project, assisting in the drafting. (Tr. 298-99) More than ten drafts were prepared. (Tr. 360) Preparation was in accordance with the FAA guidelines on the preparation of impact statements. Herman Bliss, Chief of the Airports Division, Pacific Region, FAA, James Dittmar, a project engineer for Parsons, and a number of State officials worked closely on drafting the statement. There were numerous meetings among the FAA, the State officials and Parsons. (Tr. 298-99, 822) Bliss of the FAA was in on every stage of the drafting. (Tr. 821) In response to a question as to who actually wrote the impact statement, Dittmar testified that:

> "I would go through and put one page in and then after review with perhaps the State and the FAA, they would revise—that page would be revised extensively, so . . . there is no real pride of authorship or any authorship in that page anymore. *It is more or less a joint effort by Parsons, the State, and the FAA.*" (Tr. 299; emphasis supplied)

The draft impact statement was then circulated for comment.[5] In addition to the statement itself, there were available for consultation more than 2,000 pages of supporting documents and materials. In view of the bulk of these supporting references, copies were forwarded to Washington, D.C., as needed while the originals were maintained at the FAA regional office in Honolulu and made available to

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[5] A list of those from whom comments were expressly solicited appears at pages i-x of the final EIS and includes 35 agencies of the United States Government, as well as numerous State agencies and private organizations (including Petitioners Life of the Land and Hawaii Audubon Society).

anyone who wished to see them. In fact, Petitioner Life of the Land did review those references. (Tr. 835-36) The comments to the draft impact statement by the various Federal agencies were reviewed and considered by the Chief of the Environmental Staff, Planning Division, at the FAA's Washington office and copies of all comments by Federal agencies were submitted to the Assistant Secretary of Transportation for Environment and Urban Systems. (Tr. 747-49) Copies of the comments were also forwarded to the Council on Environmental Quality. (Tr. 747, 778-79)

In January, 1972, the final EIS, redrafted by the FAA and the State, with the aid of Parsons, in light of all the state, Federal, and private comments, was approved by the FAA Pacific Regional Director and forwarded to Washington. On February 29, 1972, the impact statement was approved by the Assistant Secretary's office and forwarded to the Council on Environmental Quality. On March 30, 1972, the Executive Director of Petitioner Life of the Land requested an opportunity to make further comments on the final EIS. The Assistant Secretary's office and the Council on Environmental Quality agreed to withhold further action on the Reef Runway until Petitioner's comments could be reviewed. (Tr. 750-52) On May 2, 1972, after reconsideration of the final EIS in light of Petitioner's comments, the Assistant Secretary's office and the Council on Environmental Quality concluded that the EIS was fully satisfactory and that no further changes needed to be made. (Tr. 752-56) Finally, on May 3, 1973, the Administrator of the FAA approved the funding of the Reef Runway project based upon the final EIS. (Tr. 756-57) Through the time of final Federal approval, the State of Hawaii had spent close to $1,000,000 in engineering and environmental studies. (Tr. 570)

3. *The Final EIS*

The final EIS is 46 single-spaced pages long, plus appendices. It includes the following:

(a) *An introduction*, detailing the history of the Reef Runway project and the present congestion at HIA. (EIS 1-2)

(b) *A description of the proposed Reef Runway* and associated protective structures, together with a statement of the purposes for building the runway and a description of the Keehi Lagoon, as previously discussed. (EIS 3-7)

(c) *A discussion of the public hearing of March 22, 1971*, the participants, and the comments. (EIS 8-10)

(d) *A consideration of the impact of the project on the human and natural environment*, as follows:

(i) *Noise Abatement.* The EIS discussed present levels of unacceptable noise pollution, described earlier, and concluded, based upon the standard FAA-approved methods of noise measurement, that the construction of the Reef Runway would significantly reduce the aircraft noise in all areas currently subject to overflights. (EIS 12-15)

(ii) *Land Use.* The EIS reviewed the present land use in the project area, pointing out that the Reef Runway would not dislocate any persons lawfully resident on private or public property, or interfere with any existing public park, recreation area, or wildlife or water fowl refuge of national, state or local significance. (EIS 15-16)

(iii) *Recreational Uses.* The EIS noted that due to the polluted nature of Keehi Lagoon, recreational uses thereof are presently limited and concluded that the flushing action resulting from the construction of the two new channels described above (pp. 9-10) would enhance the recreational uses of the Lagoon.

In addition, Keehi Lagoon Park at the north end of the Lagoon would experience a marked reduction of aircraft noise. (EIS 16-17)

(iv) *Water Quality.* As described above, the EIS concluded that the water quality of Keehi Lagoon would be significantly improved by the dredging of the two new channels. The EIS reached this conclusion based upon a number of published water quality studies, including one dealing specifically with the Keehi Lagoon, and a special testing model for this project developed by the University of Hawaii. (EIS 17-20)

(v) *Visual and Air Pollution.* The EIS pointed out that the Reef Runway would move the major portion of the high-pollution heavy jet aircraft traffic out to sea, thus reducing the air pollution as to the inhabited onshore areas and improving the visual appearance of the Lagoon.[6] (EIS 20)

(vi) *Wildlife.* The EIS noted that 186 acres of coral mudflats used by the Stilt, as well as by three types of migratory birds, would be lost due to the construction of the Reef Runway. However, the EIS indicated

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[6] Symptomatic of the fault-finding approach of Petitioners is their critique of the failure of the EIS to discuss the impact of the project on invisible air pollution and the failure to order "studies" of air quality effect. (Pet. 7 n. 3) To be sure, no "studies" of air quality effect were ordered since a threshold determination was made by both State and Federal authorities that moving aircraft takeoffs to the Reef Runway almost a mile and a half seaward and away from populated areas could not increase air pollution and in fact would alleviate the air pollution problem. (Tr. 574, 766-67) Indeed, there was testimony in the record from Bach, Petitioners' own expert, that "When you get further away from somewhere, pollution tends to decrease with distance" and that to determine whether standards are met, "one measures, of course, where people are living." (Tr. 175, 178) Bach further admitted that one of the methods of preventing air pollution is "If you just move it further out . . . you couldn't care less where it goes." (Tr. 202) It is hard to analyze Petitioners' contention that air quality studies should have been ordered and performed in order to confirm these obvious truths as anything more than obstructionism.

that a joint program of state and Federal agencies was under way to create three new bird habitats which would consist of a number of islands and ponds and would be of equal or greater value to the Stilt and other birdlife.[7] (EIS 26)

(vii) *Marine Life and Fish.* The EIS here referred to a number of studies and scientific collection experiments, all of which indicated that the marine and fish life in the Lagoon is presently poor due to the polluted waters. The EIS concluded that the improved circulation in the Lagoon which would result from the Reef Runway project would improve the ecological situation in the Lagoon, increasing the numbers of most forms of sea life from microorganisms to fish. (EIS 27-32)

(e) *A notation of the only probable adverse impact of the project;* namely, the use of 765 acres of the Lagoon for the runway. (EIS 33)

(f) *A discussion of alternatives* to the Reef Runway project, as follows:

(i) *"10-28" Runway.* This alternative, originally proposed in the 1962 study mentioned above, would have been built on HIA grounds without the necessity of utilizing part of the Lagoon. It was rejected because the prevailing wind patterns at HIA would have subjected this runway to an unsafe level of crosswinds. Furthermore, while such a runway would lessen the overflight problems for the metropolitan areas east of HIA, it would create new ones for the metropolitan areas west of the airport. (EIS 34)

(ii) *Close-in Parallel Runway.* This alternative, originally recommended by the 1967 HIA Development

[7] This program is now virtually complete. A 25-acre wildlife habitat at Honouliuli, not previously used by Stilts, is now being used by a number of these birds. The improved habitat in Pearl Harbor has also enjoyed increased usage by Stilts.

Plan, called for a runway similarly oriented to the Reef Runway, but onshore. Such a runway would have solved HIA's capacity problems but would not have moved the heavy jet traffic patterns significantly further away from the densely-populated portions of Honolulu and thus would not have significantly lowered the noise pollution or appreciably improved the safety situation. (EIS 34)

(iii) *Stanford Research Institute Proposal.* The SRI proposal, suggested by a number of airlines, advocated the extension of the existing principal 8L-26R runway 4,000 feet to the west and the construction of a smaller 6,500 foot runway to the south of 8L-26R. This alternative was rejected for a number of reasons. The Air Force objected that the westward extension of 8L-26R would significantly increase the noise pollution at Hickam Air Force Base and its adjoining residential areas. Furthermore, there would have been no appreciable lessening of overflights of the metropolitan areas west of the airport. (EIS 34-35)

(iv) *Nonconstruction.* Another alternative considered was simply to forego the project entirely. This alternative was rejected because the continuation of the high noise pollution-high safety problem situation posed by the present overflights of the Honolulu area was considered unacceptable and because it would result in a limitation on the use of HIA due to capacity problems. (EIS 35)

(g) *A description of the construction procedures* and of the irreversible and irretrievable commitments of resources to be used in the project. (EIS 36-39)

(h) *A discussion of actions taken* to assure maximum safeguards against adverse environmental impact from the project. These actions include the development of water circulation criteria, the provision of pollution control guidelines during construction and a review of the criteria for the new bird habitats. (EIS 40-43)

C. Proceedings Below

On November 8, 1972, one day prior to the scheduled opening of bids for the construction of the Reef Runway, Petitioners filed suit in the United States District Court for the District of Hawaii and sought to enjoin the construction of the runway on the ground that the EIS was insufficient in a number of respects. A temporary restraining order was issued but was dissolved by the District Court on December 22, 1972, after a thorough examination of the EIS at the seven-day hearing on Petitioners' application for a preliminary injunction. That hearing resulted in a District Court finding that the EIS complied with all statutory requirements. (App. 33-42)[5] The District Court's final decision, dated April 12, 1973, adopted its earlier decision on the preliminary injunction as its decision on the merits. (App. 43-44) The Court of Appeals unanimously affirmed. (App. 1-30)

Petitioners made a multiplicity of contentions at the trial and on appeal, ranging from the claim (now abandoned) that the EIS was invalid because the 2,000 pages of reference material mentioned in the draft EIS had not physically accompanied the draft EIS at all times, to the claim that the EIS was invalid because of the participation of Parsons, the project design consultant, in its drafting. Petitioners' major contention, however, was that although the EIS did discuss the alternative of foregoing the project entirely, in that discussion it failed to treat of a number of so-called "nonconstruction alternatives"—"alternatives" raised for the first time by Petitioners in court.

Specifically, Petitioners contended that the EIS should have mentioned the "alternatives" set out below. The Dis-

[5] We so designate the Appendix to the Petition for Certiorari.

trict Court and Court of Appeals considered these claims and rejected each one as a factual matter, based upon the evidence in the record:

(a) *Moving the Air Force KC-135 tankers to another field.* The evidence showed that the FAA had initially considered this possibility but that the Air Force had been consulted and had refused to move its tanker operations from HIA. (Ds. Ex. 35; App. 22) Furthermore, this alternative would do nothing to alleviate the noise and safety problems stemming from overflights of commercial aircraft. (App. 23)[9]

(b) *Transferring private aircraft to another airfield.* The evidence showed that a ban on "general" (*i.e.*, private) aviation at HIA would violate prior HIA legal agreements guaranteeing access to the airport to all users. In addition, such a ban would have no effect on the major overflight problems caused by commercial and military aviation. (App. 23) Finally, there was simply nowhere else on the island (of Oahu) to relocate general aviation, although in the future other sites might become available. (Tr. 550-51, 554-56)

(c) *Changing the takeoff patterns of inter-island flights.* The evidence indicated that requiring the two-engined aircraft used for inter-island flights, which require a shorter runway than do the larger trans-Pacific aircraft, to take off from a different position (the end, rather than the

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[9] Petitioners contend, apparently in passing (Pet. 24 n. 9), that "The United States Air Force, whose KC-135 tankers are conceded by all parties to be the worst noise and safety offenders at HIA, has consistently refused to commit itself to utilizing the new Reef Runway." In fact, the record contains (Tr. 624-28) a commitment, signed by the Assistant Secretary of the Air Force, to use the Reef Runway at HIA (which has been designed to Air Force design standards) except during emergencies.

cross) on the existing runway would affect only a small percentage of airport operations and, of course, would have no effect upon the larger and noisier military and trans-Pacific commercial aircraft. (App. 23) Furthermore, under the present crowded conditions at HIA (without the Reef Runway) the additional time required for inter-island takeoffs under this "alternative" would cause serious additional airport congestion.[10] (Tr. 565)

(d) *Imposition of higher landing fees.* The evidence demonstrated that higher landing fees were not a reasonable alternative because fees four to five times higher at other airports have made no significant difference in air traffic patterns. (Tr. 557-58; App. 23)

(e) *Other "alternatives."* There was no evidence at all in the record to suggest that any of the other "alternatives" alleged for the first time in court, such as forcing the airlines to change their schedules, imposing curfews, retrofitting older aircraft with less noisy power-plants, or converting to wide-body aircraft, are reasonable possibilities at HIA. (App. 23-24) Furthermore, most of these "alternatives" are not within the scope of the powers of HIA or the State of Hawaii. Thus, this Court held in *City of Burbank* v. *Lockheed Air Terminal, Inc.*, 411 U. S. 624 (1973), that local authorities cannot impose curfews. Similarly, support for retrofitting older aircraft—which can hardly be done by HIA alone—was denied by the United States Office of Management and Budget. (Tr. 562-63) Finally, none of these "alternatives" would have alleviated

[10] However, once the Reef Runway is in operation, there is a likelihood that the inter-island carriers would be required, if they did not use the Reef Runway, to start at the end of the existing runway, since the reduction of traffic on the existing runway occasioned by the construction of the Reef Runway would make this feasible. (Tr. 640)

the safety problems from overflights of populated areas due to the location of the present principal runway.

For all of the above reasons, both courts below rejected *in toto* Petitioners' contentions as to the insufficiency of the EIS treatment of alternatives, holding that the EIS need set forth only those alternatives "sufficient to permit a reasoned choice." (App. 24) They rejected the contention that every conceivable alternative must be set forth in the EIS even where the implementation, feasibility or efficacy of the alternative is "remote and speculative." (App. 24) Then, after a full review of the EIS in light of the requirements of § 102(2)(C) of the National Environmental Policy Act and § 16(c)(4) of the Airport and Airways Development Act, the lower courts upheld the adequacy of the EIS. After the Court of Appeals' decision, it denied a petition for rehearing and a suggestion for rehearing *en banc*.

After construction of the Reef Runway commenced following the decision of the Court of Appeals, Petitioners submitted to the Circuit Justice an application for stay of the mandate of the Court of Appeals and for reinstatement of an injunction pending appeal of that court pending application for certiorari. On November 2, 1973, Mr. Justice Douglas granted that application, pending reconsideration of the application when memoranda from the Respondents were received. Upon such reconsideration, Mr. Justice Douglas, on November 7, 1973, adhered to his original order. Thereafter, various of the Respondents, including the Director, Department of Transportation, State of Hawaii, moved the full Court to vacate the order. The Director's motion appended an affidavit of an oceanographer in support of the contention that "more harm than good results to the environment by the injunction", for the reason, among others, that the stage of construction which had been reached at the time of the order created increased

stress on the marine environment in the Lagoon. An affidavit of the Chief of the State Airports Division stressed the economic consequences in terms of layoff of workers, costs incurred without benefit and the extent of idle workers and equipment occasioned by the stoppage. On November 21, 1973, this Court entered an order vacating the stay order. Construction has progressed since then on the Reef Runway and protective structure.

ARGUMENT

This case involves the attempt of Petitioners Life of the Land, *et al.*, to halt the construction of the Reef Runway at Honolulu International Airport, Honolulu, Hawaii, on the grounds that the EIS for the project is legally insufficient. Abandoning most of the thirteen or so separate contentions asserted in the Court of Appeals as to alleged deficiencies in the EIS and in the project, Petitioners make three claims here as to errors on the part of the courts below. They claim conflicts among the Courts of Appeals on all three issues. In fact, Petitioners' real quarrel is with the interpretation of the evidence concurred in by both courts below. There is no conflict with the decisions of other Courts of Appeals, and no issue warranting further review. Accordingly, certiorari should be denied.

I. The Court of Appeals Applied Correct Standards of Review

Petitioners contend that the Court of Appeals erroneously applied the Administrative Procedure Act's ("APA") "arbitrary and capricious" standard in its review of the question of what alternatives were required to be included in the EIS and that, as a result, there is a conflict among the Courts of Appeals as to the scope of review. This contention is simply based upon a misreading of the opinion below. The court below in fact quite properly applied two different standards of review to two different matters:

(a) *Review of the substantive decision.*—With respect to the FAA's substantive decision to proceed with the Reef Runway project, the court applied the "arbitrary and capricious" standard of the APA, 5 U.S.C. § 706(2)(A). The court quoted from its decision in *Jicarilla Apache Tribe of Indians* v. *Morton*, 471 F.2d 1275 (9th Cir. 1973):

> "Reversal of a substantive decision is appropriate only to situations where the . . . [decision] was arbitrary or clearly gave insufficient weight to environmental factors." 475 F.2d, at 1281; App. 18.

The court then observed that it would "examine appellants' substantive challenges, therefore, mindful of the circumscribed nature of our review." (App. 18)[1]

This limited examination of the substantive decision is in accord with the law in every circuit; indeed, this Court

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[1] The positive environmental effect of the Reef Runway—as made evident by the discussion at pp. 3-10, 13-15, *supra*—is such that the substantive decision would have survived any conceivable standard of review. Petitioners' scanty Statement of the Case (Pet. 4-10) ignores the environmental problems which the Reef Runway helps solve and essentially contents itself with a critique of the EIS and a discussion of the steps in the present litigation.

has indicated that the "arbitrary and capricious" standard must be applied in such instances:

> "[T]he ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency." *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 416 (1971).

See also *Environmental Defense Fund, Inc.* v. *Froehlke*, 473 F.2d 346, 353 (8th Cir. 1972); *Natural Resources Defense Council, Inc.* v. *Morton*, 458 F.2d 827, 838 (D.C. Cir. 1972).

Petitioners' complaint that this result makes the NEPA "an act of futility," because even before NEPA an agency's substantive decisions were subject to this standard of review, misses the point. The NEPA was not designed to create a new standard of review as to an agency's substantive decisions—rather, it created new procedural requirements, and also created a right to review as to compliance with those procedures, as discussed below. See *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, *supra*, 401 U.S., at 419-20; *Save Our Ten Acres* v. *Kreger*, 472 F.2d 463 (5th Cir. 1973).

(b) *Review of procedural decisions.*—With respect to the review of the FAA's procedural decisions within the scope of the NEPA[2]—for example as to which alternatives would be discussed in the EIS—the court below applied an entirely different standard, that of "reasonableness." (App. 24) Obviously, it would be impossible for any

[2] The NEPA requires that the EIS include a statement on "alternatives to the proposed action." 83 Stat. 853, 42 U.S.C. § 4332 (2)(C)(iii). There is no question but that the EIS here discussed "alternatives to the proposed action." The only issue is how many and which "alternatives" had to be discussed. It is as to this narrow sort of procedural issue within the scope of the NEPA that the court below applied a standard of "reasonableness."

EIS to consider and expressly reject every alleged "alternative" which litigation counsel, in a subsequent court attack on the EIS, might imagine. Accordingly, the court below, citing *Natural Resources Defense Council, Inc.* v. *Morton, supra*, and other authorities, held that "the EIS need only set forth those alternatives 'sufficient to permit a reasoned choice'." The Court of Appeals specifically stated that the requirement of "NEPA's 'alternatives' discussion is subject to a construction of reasonableness." (App. 24) The "reasonableness" standard is followed in all the circuits insofar as we are aware. See, in addition to the cases cited above, *Wyoming Council* v. *Butz*, 5 E.R.C. 1844 (10th Cir. 1973); *Hanly* v. *Kleindienst*, 471 F.2d 823 (2d Cir. 1972).

As a result of NEPA, therefore, an agency's procedural determinations are subject to a more thoroughgoing review than are its ultimate substantive decisions. This result is entirely consistent with Congress' view of NEPA as "action forcing" in the sense that it requires the agency to put on the table, and weigh and consider, environmental costs; NEPA does not require particular substantive results. See *Silva* v. *Lynn*, 482 F.2d 1282 (1st Cir. 1973); *Calvert Cliffs Coordinating Committee* v. *Atomic Energy Comm'n*, 449 F.2d 1109 (D.C. Cir. 1971).

Under this "reasonableness" standard, the court below examined the record in detail, reviewed the evidence, and concluded that, based upon the evidence before it, Petitioners' contended-for "alternatives" were unreasonable and the procedural decisions of the FAA with respect to the alternatives to be included and discussed in the EIS were reasonable. See, *e.g.*, App. 21-24.[3]

[3] We note that a number of the cases cited by Petitioners in support of their contention that a conflict exists between the Courts

II. The Decision of the Court Below Was Correct as to the Discussion of and Findings as to Alternatives Under the NEPA and AADA

1. *NEPA.*—As the earlier discussion (pp. 15-16, *supra*) makes plain, the EIS here contained a discussion of the serious alternatives to the Reef Runway and was prepared after extensive opportunity for comment and the fullest publicity as to the proposed project. (Pp. 10-12, *supra*) Petitioners' principal contention in this litigation now is that the EIS should have contained a discussion of still more "alternatives"—"alternatives" which Petitioners, who participated in the administrative process, never voiced there. But, as pointed out in the preceding section, the Court of Appeals reviewed the evidence in the record and determined that the decision not to include in the EIS a discussion of certain of Petitioners' now-proposed "nonconstruction alternatives" was reasonable. Petitioners now contend that in this respect the decision conflicts with *Natural Resources Defense Council, Inc.* v. *Morton, supra* ("*NRDC*"). (Pet. 20-21) In fact, as the opinion below makes clear, there is no such conflict. The court below expressly relied upon the *NRDC* case in reaching its conclusion. (App. 24)

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of Appeals involve cases in which the decision of the agency was to prepare *no* EIS at all. *E.g., Save Our Ten Acres* v. *Kreger, supra; Hanly* v. *Kleindienst, supra.* While we believe, as demonstrated above, that there is no conflict between these cases and the present case, we would also note that that line of cases specifically states that there is a significant distinction between instances where no EIS is prepared at all and those where the dispute involves how many, and which, "alternatives" need be discussed in the EIS. See *Save Our Ten Acres* v. *Kreger, supra*, 472 F.2d. at 465 n.4. Obviously, no EIS can discuss every conceivable alternative.

NRDC held that an agency may not disregard alternatives merely because their implementation is within the jurisdiction of another agency. 458 F.2d, at 834. Petitioners see a conflict between that holding and the holding below that there need be no EIS discussion of the removal of the Air Force tanker operation from HIA to another location in the present case. (Pet. 20-21) But, as the court below pointed out, the Air Force—the other agency involved here—*had been approached* and had flatly *refused* to go along with this "alternative." (App. 22-23) Thus, there is no question here of failure to consult other agencies or to consider an "alternative". Rather, as a result of that consultation it was clear that implementation of this "alternative" was impossible. That sort of "alternative" need not be discussed. *NRDC* v. *Morton, supra,* 458 F.2d, at 834, 836.

Petitioners next note that *NRDC* held that "discussion of particular alternatives may not be omitted merely because they are not complete solutions in and of themselves" and claim that the court below discounted the possibility of moving the Air Force and "general" aviation operations somewhere else for just such a reason. (Pet. 20-21) In fact, as just recounted, the court below held that moving the Air Force operations need not be discussed because it was not possible. (App. 22-23) Similarly, the court noted that a ban on general aviation would be impossible because of HIA's legal commitments.[4] Furthermore, the court pointed out that moving the general aviation operation would have "no effect" at all on the problems of noise pol-

[4] As set forth above, moving the inter-island DC-9 and Boeing 737 two-engine takeoffs so that they would commence at a different point on the existing runway was also not feasible as a nonconstruction alternative because, absent expansion of the airport through new runway construction, moving the takeoff point for these flights would cause intolerable congestion. See pp. 18-19, *supra.*

lution and safety, which are caused by the commercial and military operation. (App. 23) *NRDC* does not require a discussion of such "alternatives."

2. *AADA*.—Petitioners contend that the holding of the court below of compliance with § 16(c)(4) of the AADA, 84 Stat. 227, 49 U.S.C. § 1716(c)(4), conflicts with this Court's interpretation of certain similar language (in another context) in § 4(f) of the Department of Transportation Act, as amended, 82 Stat. 824, 49 U.S.C. § 1653(f). The claim is that *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, *supra*, in effect holds that compliance with AADA requires a showing of "the most unusual situation" before the project can proceed. (Pet. 21-27) Petitioners quote at length from *Overton Park*, relying on this Court's statement that the DOT Act's

> ". . . language is a plain and explicit bar to the use of federal funds for the construction of highways through parks—only the most unusual situations are exempted." 401 U. S., at 411; Pet. 23.

Petitioners' argument is a classic example of attempted literal transference of words from one context to another without concern for statutory purpose or common sense.[5] Congress in the DOT Act unmistakably meant a bar, absent "the most unusual situation," on the construction of highways through parks. The purpose of that Act was certainly not to encourage the construction of highways through parks. But it is hardly likely that Congress in

[5] In the context of the AADA, the language is to the effect that the Secretary "shall authorize no such [airport extension] project found to have adverse effect [on natural resources . . . and other factors affecting the environment] unless the Secretary shall render a finding . . . that no feasible and prudent alternative exists and that all possible steps have been taken to minimize such adverse effect." § 16(c)(4).

enacting legislation—the AADA—for "the establishment of a nationwide system of public airports to meet the present and future needs of civil aeronautics," § 14(a), 84 Stat. 224, 49 U.S.C. § 1714(a), intended "a plain and explicit bar to the use of federal funds" for the construction of airports and runways. Indeed, the entire purpose of the AADA was to provide the mechanism for Federal financing of airport and runway improvements.[6]

As the court below concluded, based upon its detailed examination of the record and upon this Court's holding in *Overton Park*, the responsible Federal agency reasonably believed—for the reasons discussed at length in the Statement—that there were no feasible alternatives to the Reef Runway project and that steps had been taken to "minimize" whatever adverse effects it had on the environment.[7]

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[6] Petitioners' argument that the language in AADA § 16(c)(4) must be interpreted to mean the same as the language in § 4(f) of the DOT Act produces extraordinary consequences. While the occasion for adding § 4(f) to the DOT Act was the passage of the Federal-Aid Highway Act of 1968, see Pub. L. 90-495, § 18(b), 82 Stat. 824 (1968), § 4(f) is not limited to highway projects. It requires the making of the finding in question for "any program or project which requires the use of any publicly-owned land from a public park" if the "program or project" is one within the jurisdiction of the Secretary of Transportation. Thus, § 4(f) requires the finding in question to be made in the case of the Federally-financed construction or extension of an airport through or in a public park (such as in the well-publicized airport extension program in Grand Teton National Park, Wyoming). Petitioners' argument thus leads to the absurdity that no higher standard is required under DOT Act § 4(f) to construct an airport extension in a public park than is required under the AADA to construct an airport extension elsewhere.

[7] As the Court of Appeals pointed out, the factor which triggers the necessity for the finding under the AADA is the existence of an "adverse effect" upon the environment through the project. (App. 29) But it is plain that virtually every airport expansion project will have some adverse effect upon certain aspects of the environment. In this context, the language in the AADA is obviously intended to move the Federal agency toward carrying

(App. 30) The appropriate procedures were followed when that finding was made[8] (App. 29-30), and the AADA requires no more. *Citizens to Preserve Overton Park, Inc.* v. *Volpe, supra,* 401 U. S., at 416.

III. Parsons' Participation in Drafting the EIS Was Not Improper

As indicated (pp. 9-12, *supra*) the EIS in the present case was jointly prepared by the FAA, the State of Hawaii, and the Ralph M. Parsons Company, the Reef Runway project's design consultant. Both courts below concluded that the fact that Parsons, which was undisputedly financially interested in the project, participated in the drafting did not invalidate the EIS because the responsible FAA officials participated at every step. (App. 13-15; 40-41) Petitioners claim that this holding conflicts with the Court of Appeals' decision in *Greene County Planning Board* v. *Federal Power Comm'n,* 455 F.2d 412 (2d Cir.), *cert.*

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out the expansion in a way which minimizes the adverse effect upon the environment. Here, the only such adverse effect was the effect on Keehi Lagoon (EIS 33) and, in particular, upon the Hawaiian Stilt. The project, however, involved construction of suitable alternative grounds for the Stilt, and it was on this basis that the agency found that "all possible steps have been taken to minimize such adverse effect." AADA, § 16(c)(4). There is no attack in this Court on the adequacy of the measures to provide alternative grounds for the Hawaiian Stilt.

[8] There is no dispute that, pursuant to DOT Order 5050.2, the finding required by the AADA is to be made by the director of the FAA's Pacific region, or that such a finding was in fact made. A copy of that finding appears in the final EIS immediately preceding the title page. Furthermore, there is no dispute that the EIS itself may serve either as the § 16(c)(4) finding, or, in the alternative, as the record in support of that finding. *Citizens' Airport Committee* v. *Volpe,* 351 F. Supp. 52 (E.D. Va. 1972); App. 29.

denied, 409 U.S. 849 (1972), and with a District Court decision, *Conservation Soc'y* v. *Secretary of Transportation*, 362 F. Supp. 627 (D. Vt. 1973).

In *Greene County*, the FPC had required the applicant for a permit to write the impact statement, which the FPC then adopted verbatim with no input of its own. See 455 F.2d, at 416-17. Similarly, in *Conservation Soc'y*, the Federal Highway Administration delegated responsibility for the preparation of the EIS to the Vermont Highway Department. The FHWA's representative occasionally consulted with, but never supervised, the Vermont personnel who did the actual drafting. Furthermore, the FHWA had no significant input on the final EIS, contenting itself with three general comments. 362 F. Supp., at 629-30. The FHWA did not write or edit a single passage of the EIS. *Id.*, at 632. In both these instances, the courts held that the EIS involved was improperly prepared.[9]

These cases are inapposite here. Both courts below concluded that "the evidence shows that F.A.A. officials did in fact work together with state officials and a private contractor and gave it [the EIS] close attention." (App. 14; 40-41) There is thus no question here of a Federal agency "entrusting" the drafting of an EIS to outsiders, as Petitioners claim. No court has held that it is forbidden for the Federal agency in charge to work with others, so long as that agency performs its statutory duty of controlling

[9] To be sure, there have been a number of cases which appear to look the other way from *Greene County* and *Conservation Soc'y*, and uphold such delegations of the responsibility for the drafting of an EIS. See *National Forest Preservation Group* v. *Volpe*, 352 F. Supp. 123 (D. Mont. 1972); *Finish Allatoona's Interstate Right, Inc.* v. *Volpe*, 355 F. Supp. 933 (N.D. Ga. 1973). Whatever the difference in approach in the cases, the decision below is not at variance with the decisions relied upon by Petitioners.

the drafting of the EIS. That is precisely what the courts below found, as a matter of fact, was done here.[10]

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The EIS in this case and the concurrent rulings of the two lower courts make it plain that the Reef Runway project will have a positive, beneficial effect on noise and air pollution over the densely populated city of Honolulu and that the construction projects incident to it will actually improve the present water pollution situation in Keehi Lagoon. The only material environmental problem identified in the review process was the problem as to the Hawaiian Stilt, and Petitioners raise no question here as to the adequacy of the measures developed to produce equivalent grounds for the Stilt. There is no conflict among the Courts of Appeals as to the various questions of procedure tendered to this Court in the present litigation, and there is no reason for further review of the concurrent findings of the two courts below.

[10] Petitioners complain (Pet. 10, 28) that they were restricted in their examination of the Parsons' representative to show the extent to which he had participated in drafting the EIS. But this is irrelevant. It was not disputed that Parsons participated materially in drafting the EIS. The only question is whether the Federal agency also participated materially and performed its statutory duty of controlling the drafting of the EIS.

CONCLUSION

For the reasons stated, the Petition for a Writ of Certiorari should be denied.

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